90-5 52(1)

No.

In the Supreme Court of the United States
OCTOBER TERM, 1990

OSCAR DIAZ-ALBERTINI,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DENNIS J.C. OWENS, ESQUIRE
Counsel of Record
ROBIN S. MARTINEZ, ESQUIRE
Attorney
THE OWENS LAW FIRM
4505 Madison Avenue
Kansas City, Missouri 64111
(816) 931-8812

Counsel for the Petitioner

September 20, 1990

QUESTIONS PRESENTED

I

Whether the district court correctly denied the petitioner's motion to vacate his sentence under 28 U.S.C. 2255 on the ground that the petitioner failed to demonstrate cause for his failure to raise his claims on direct appeal of his conviction.

II

Whether the decision of the United States Court of Appeals for the Tenth Circuit in this case is in conflict with the holding of this Court in *Chappell v. United States*, _____ U.S. _____, 110 S.Ct. 1800 (April 16, 1990).

LIST OF PARTIES

The parties to the proceedings below were Mr. Oscar Diaz-Altertini, the petitioner, and the United States, the respondent.

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TABLE OF AUTHORITIES

Constitution and statutes:

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

OSCAR DIAZ-ALBERTINI,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

This case was heard under Title 28, U.S.C. Section 2255, in the United States District Court for the District of New Mexico (D.C. Civil Number 89-0403 HB) and the United States Court of Appeals for the Tenth Circuit (Slip op. 89-2152).

Prior to proceedings under 28 U.S.C. 2255, this case was heard in the United States District Court for the District of New Mexico (D.C. Criminal Number 84-43-1) and the United States Court of Appeals for the Tenth Circuit, *United States v. Diaz-Albertini*, 772 F.2d 654 (l0th Cir. 1985). *Certiorari* was denied in that case by this Court, 108 S.Ct. 82

(1987).

JURISDICTIONAL GROUNDS

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and is sought after the denial of a petition for rehearing, such denial being entered on July 18, 1990, by the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF THE CASE

On April 11, 1984, the petitioner, Oscar Diaz-Albertini, was convicted for a violation of Title 21, U.S.C. Section 841(a)(l). He was sentenced to a term of ten years imprisonment and a special parole term of five years. Mr. Albertini and his wife had been found guilty by a jury after his entry of a plea of not guilty. After the trial, it was determined that one of the jurors had close personal relationships with the law enforcement officers responsible for Mr. Albertini's search and arrest.

Mr. Albertini was represented at trial by William Clay, Esquire. During the proceedings, Mr. Clay was informed that a problem existed regarding one of the jurors in Mr. Albertini's case. Mr. Clay did not act on that information, nor did he make any inquiries at that time into the juror's disqualifying circumstances in order to ensure that Mr. Albertini was tried by an impartial jury. In post-trial proceedings, Mr. Clay testified that due to the pressures of trial he was unable to grasp the significance of the problem with the juror. Mr. Clay testified that he did not even learn of the juror's disqualifying circumstances until after the time to file a motion for a new trial had expired. The District Court held that Mr. and Mrs. Albertini did not receive a trial

by an impartial jury. The Court set aside her conviction on those grounds, but refused to set aside Mr. Albertini's conviction because of the conduct of his attorney.

The United States Court of Appeals for the Tenth Circuit reviewed Mr. Albertini's conviction on direct appeal. Mr. Albertini was represented by Dennis Owens, Esquire, on appeal. *United States v. Diaz-Albertini*, 772 F.2d 654 (10th Cir. 1985). The Tenth Circuit affirmed the conviction, essentially concluding that Mr. Albertini waived his right to an impartial jury because of Mr. Clay's failure to object to the inclusion of the biased juror on the panel. The Tenth Circuit determined that Mr. Clay was aware of the problem with the juror and that he deliberately withheld that information, effectively "sandbagging" the trial court by deciding to raise the issue only after a guilty verdict had been rendered.

After the Tenth Circuit's opinion had been entered in the direct appeal, Mr. Albertini petitioned this Court for its writ of *certiorari*. The Solicitor General filed a brief opposing issuance of the writ. *Certiorari* was denied, 108 S.Ct. 82 (1987).

Upon exhaustion of all avenues of direct appeal, Mr. Albertini filed a motion to vacate his sentence, pursuant to 28 U.S.C. 2255, in the United States District Court for the District of New Mexico. He argued that he had been denied the effective assistance of counsel due to Mr. Clay's failure to raise the juror bias issue during the pendency of the trial. The district court, on July 3, 1989, denied Mr. Albertini's

motion. (This Order is in the Appendix.)

The basis of the district court's decision was that Mr. Albertini's claim of ineffective assistance of counsel was barred due to procedural default, thus barring him from raising the issue through a subsequent motion to vacate sentence under 28 U.S.C. 2255. The procedural default was the failure to raise the effective assistance of counsel issue on direct appeal.

Mr. Albertini appealled the district court's decision to the United States Court of Appeals for the Tenth Circuit, which affirmed the decision. (The Opinion of the Tenth Circuit is in the Appendix.) Mr. Albertini then filed a petition for rehearing.

Subsequently, the decision of this Court in *Chappell v. United States*, ___ U.S. ___, 110 S.Ct. 1800 (1990), was brought to the attention of the Tenth Circuit, together with the unpublished decision below of the Seventh Circuit and copies of the Brief of the United States in Opposition to the grant of the writ of *certiorari* in that case.

Two of the three members of the hearing panel concluded that the original disposition of the case by the Tenth Circuit was correct. Rehearing was denied. The third member of the panel, Judge McKay, indicated that he would grant rehearing "because he believes the case to be controlled by *Chappell v. United States*, ___ U.S. ___, 110 S.Ct. 1800 (1990)." (This Order is in the Appendix.)

REASONS FOR GRANTING THE WRIT

Mr. Albertini's petition for *certiorari* should be granted, the judgment vacated, and his case remanded to the United States Court of Appeals for the Tenth Circuit, because the decision of the court of appeals is clearly not in accord with this Court's ruling in *Chappell v. United States*, ___ U.S ___, 110 S.Ct. 1800 (1990). The question presented in this case is identical to the issue raised in *Chappell*, whether the petitioner is procedurally barred from raising the issue of ineffective assistance of counsel in a collateral attack on his conviction under 28 U.S.C. 2255, if that argument was not raised on direct appeal.

The Tenth Circuit's decision places Mr. Albertini in a untenable procedural position which has severely prejudiced him. There is no dispute that he did not have an impartial jury at trial. This fact is central. The record is undisputed as to the inclusion of a juror whom the district court found to be biased. The Fourth Circuit has noted that "[n]othing is more fundamental to the provision of a fair trial than the right to an impartial jury." *Miller v. North Carolina*, 583 F.2d 701, 706 (4th Cir. 1978). Another circuit has held that the bias of a mere one juror is significant because if one juror was prejudiced, the defendant is denied his constitutional right to an impartial jury. *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979).

Mr. Albertini raised the juror bias issue on direct appeal of his conviction. *United States v. Diaz-Albertini*, 772 F.2d 654 (10th Cir. 1985), cert. denied, 108 S.Ct 82 (1987).

However, the United States Court of Appeals for the Tenth Circuit concluded that he was procedurally barred from obtaining relief on the basis of the juror bias issue because his trial counsel failed to object to the inclusion of the biased juror during the trial. The Tenth Circuit determined that Mr. Clay had known of the biased juror, but that he deliberately chose not to raise the issue until after the trial had been concluded. On this basis of his attorney's misconduct, review of the merits of Mr. Albertini's claim was precluded.

In light of the Tenth Circuit's conclusion as to Mr. Clay's conduct, Mr. Albertini proceeded with his motion to vacate his sentence pursuant to 28 U.S.C. 2255, arguing that he had been denied the effective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution.

Mr. Albertini sought relief under the standard delineated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984): that the test for judging whether counsel rendered constitutionally ineffective assistance is whether counsel's conduct so undermined the proper functioning of the adversarial process that a trial can not be relied on as having produced a just result." *Id*, at 104 S.Ct. 2064. Mr. Clay's conduct resulted in Mr. Albertini being tried by a biased jury. When taken in the context of the holdings of *Miller v. North Carolina, supra*, and *United States v. Eubanks, supra*, it is evident that Mr. Albertini had a credible claim which should have been reviewed on its merits.

This particular result runs afoul of this Court's recent decision in *Chappell v. United States*, ____U.S____, 110 S.Ct. 1800 (1990). The issue presented in *Chappell* is identical to the one in Mr. Albertini's case: whether or not a showing of cause for failure to raise the issue of effective assistance of counsel on direct appeal is required of petitioners who make that claim in collateral attacks on their convictions.

In *Chappell*, this Court granted *certiorari*, vacated the judgment and remanded the case to the United States Court of Appeals for the Seventh Circuit for further consideration in light of the position asserted by the Solicitor General in his brief for the United States, filed February 27, 1990. Id. The United States' position basically concurred with Mr. Albertini's position in this case that claims of ineffective assistance of counsel ordinarily should be raised in the first instance in a motion under 28 U.S.C. 2255, rather than on direct appeal (Brief For The United States in Opposition, pp. 7, 8, *Chappell v. United States, supra*).

The United States has long contended that claims of ineffective counsel should be raised in the first instance in a motion under Section 2255, rather than on direct appeal. This was the position of the Solicitor General in *United States v. Cronic*, 466 U.S. 648 (see U.S. Brief at 40-41 and U.S. Reply Brief at 20).

The circuits are not in conflict with this view, with few exceptions. *United States v. Costa*, 890 F.2d 480, 482-483 (lst Cir. 1989); *United States v. Cruz*, 785 F.2d 399, 404 (2d

Cir. 1986); *United States v. Aulet*, 618 F.2d 182, 185-186 (2d Cir. 1980); *United States v. Sandini*. 888 F.2d 300, 311-312 (3d Cir. 1989); *United States v. Akinseye*, 802 F.2d 740, 744 (4th Cir. 1986), cert. denied, 482 U.S. 916 (1987); *United States v. Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, 459 U.S. 843 91982); *United States v. Ugalde*, 861 F.2d 802, 804 (5th Cir. 1988), cert. denied, 109 S.Ct.2447 (1989); *United States v. Myers*, 892 F.2d 642, 648-649 (7th Cir. 1990); *United States v. Rewald*, 889 F.2d 836, 859 (9th Cir. 1989); *United States v. Casamayor*, 837 F.2d 1509, 1516 (llth Cir. 1988), cert. denied, 109 S.Ct. 813 (1989). In the District of Columbia Circuit, if a claim of ineffective assistance of trial counsel is raised on direct appeal, that court ordinarily will remand the case to the district court for resolution of the claim before disposing of the direct appeal--or, if the defendant has also filed a Section 2255 motion raising an ineffectiveness claim, the court will stay proceedings on the direct appeal pending resolution of the Section 2255 motion. *United States v. Cyrus* 890 F.2d 1245, 1247 (1989).

Clearly, the Supreme Court rejected the approach of the Tenth Circuit in this case when it remanded the *Chappell* case.

Furthermore, Mr. Albertini should not be required to make a showing of cause as to why he did not raise the ineffective assistance of counsel argument on direct appeal. Such a requirement is unreasonable. The *Chappell* decision implicitly adopted the position of the United States as articulated by the Solicitor General. He conceded in his *Chappell* brief that failure to pursue ineffective assistance of

counsel claims on direct appeal would not constitute a procedural default. Thus, the need for a showing of "cause" would be dispensed with.

CONCLUSION

The Court should issue its writ of *certiorari* to the Tenth Circuit and remand this case with directions that it further consider the matter in light of *Chappell v. United States* and the position of the Solicitor General in that controversy.

Mr. Albertini should be allowed to raise the very real issue of the effectiveness of his trial counsel. By granting *certiorari* in this case, the Court will make that possible for the first time.

Respectfully submitted,
THE OWENS LAW FIRM

DENNIS OWENS, ESQUIRE
Counsel of Record

ROBIN S. MARTINEZ, ESQUIRE
Attorney
4505 Madison Avenue
Kansas City, Missouri 64111
(816) 931-8812
Counsel for the Petitioner

APPENDIX

(Filed May 2, 1990)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

89-2152

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
OSCAR DIAZ-ALBERTINI,
Defendant-Appellant.

Appeal From the United States District Court
for the District of New Mexico
(D.C. Criminal No. 89-403HB)

ORDER AND JUDGMENT

Before McKAY, BARRETT, Circuit Judges,
and KANE,* District Judge.

This is an appeal from the denial of appellant's motion to vacate sentence pursuant to 28 U.S.C. § 2255 because of alleged ineffective assistance of counsel. The United States District Court for the District of New Mexico, after *de novo*

* Honorable John L. Kane, Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

review, adopted the findings of the United States Magistrate which found that appellant's claim was procedurally barred.

Appellant was convicted under 21 U.S.C. § 841(a)(l) of possession of cocaine with intent to distribute. Before trial, appellant's counsel was made aware that a potentially biased juror had been selected for appellant's panel. Appellant's counsel did not bring this matter to the attention of the trial judge until well after trial. After being apprised of the problem, the trial court held several post-trial hearings and concluded "that counsel made a conscious decision to postpone raising the matter until after a conviction resulted." *United States v. Diaz-Albertini*, 772 F.2d 654, 656 (10th Cir. 1985), *cert. denied*, 484 U.S. 822 (1987). On direct appeal, this court held that when the facts supporting a claim of juror bias are known prior to trial, the issue cannot be deferred and raised for the first time after trial. *Id.* at 657. Such conduct constituted a waiver of appellant's right to attack the composition of the jury, *id*, and was a procedural default barring this court from considering appellant's juror bias claim on direct appeal.

The district court viewed appellant's section 2255 claim as an attempt to relitigate the juror bias issue. In order for this court to consider appellant's juror bias claim on collateral review, appellant must comply with the requirements set out by the Supreme Court in *United States v. Frady*, 456 U.S. 152, 168 (1982): "[t]o obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his double procedural default, and (2) 'actual preju-

dice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 167-68 (1982). The district court found that, while the section 2255 claim was styled as an independent claim of ineffective assistance of counsel, it was more properly an attempt to satisfy the cause requirement necessary under *Frady* to remedy the prior procedural default which had barred this court from hearing the claim of juror bias on direct appeal.[1] The district court dismissed appellant's section 2255 claim based on his failure to raise the ineffective assistance issue on direct appeal, and on his failure to demonstrate cause. We affirm.[2]

On direct appeal we found the conduct on the part of appellant's trial counsel to be a conscious choice in the nature of a tactical decision, *Diaz-Albertini*, 772 F.2d at 657, and we agree with the district court that such strategic trial decisions, and even errors due to counsel's inadvertence or ignorance, will not serve as causes to excuse procedural default. *See Reed v. Ross*, 468 U.S. 1, 14-15 (1984); *Murray v. Carrier*, 477 U.S. 478, 486-87 (1986). This conclusion, however, is qualified by the assumption that counsel was competent: "Underlying the concept of cause, however, is at

[1] A proper showing of ineffective assistance of counsel will satisfy the showing of cause required to excuse a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

[2] While both parties in their briefs identify the proper standard of review here as the clearly erroneous standard, we think otherwise. The clearly erroneous standard is appropriate when we review factual findings of a district court acting pursuant to 28 U.S.C. § 2255. *United States v. Owens*, 882 F.2d 1493, 1501 n.16 (10th Cir. 1989). Here, however, the district court did not conduct a hearing, holding instead that appellant's claim was barred because of appellant's procedural default. A finding of procedural default is a conclusion of law. Conclusions of law are reviewable *de novo*. *Bill's Coal Co. v. Board of Public Utilities*, 887 F.2d 242, 244 (10th Cir. 1989).

least the . . . notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of *competent* counsel. . . ." *Reed v. Ross*, 468 U.S. at 13, (emphasis added). "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668, 690 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Murray v. Carrier*, 477 U.S. at 488. Furthermore, in justifying its decision to hold a claimant barred by procedural default to a showing of both cause *and* prejudice before such default will be excused, the Supreme Court has cited the right to effective assistance of counsel as "an additional safeguard against miscarriages of justice in criminal cases." *Id* at 496. "The ability to raise ineffective assistance claims based in whole or in part on counsel's procedural defaults substantially undercuts any predictions of unremedied manifest injustices [caused by imposing the cause and prejudice requirement]." *Id.* Counsel's tactical choice at trial to forego objecting to the allegedly biased juror will fail to serve as cause for the procedural default only if appellant's trial counsel was competent.

The government argues that appellant's case is one of double procedural default: the first procedural default being appellant's failure to raise the juror bias issue at trial, and the second procedural default being appellant's failure to raise his ineffectiveness claim on direct appeal. This second failure, the government contends, bars appellant from raising his ineffectiveness claim in a collateral proceeding absent a showing of cause and prejudice. "We agree that the failure

to raise a constitutional claim at trial or on direct appeal generally will prohibit federal collateral review of that claim absent cause and prejudice." *Osborn v. Shillinger*, 861 F.2d 612, 622 (l0th Cir. 1988) (citing *Murray v. Carrier*, 477 U.S. 478 (1986)).[3] However, as we have held in *Osborn*, a claim of ineffective assistance of counsel may be brought for the first time collaterally without a showing of cause and prejudice. *Id.* (citing *Kimmelman v. Morrison*, 477 U.S. 365 (1986)). In *Osborn*, we allowed the petitioner to resurrect his ineffectiveness claim, noting that "*[w]here . . . an ineffectiveness claim cannot be made on the basis of the record and the allegedly ineffective counsel handled both the trial level proceedings and the direct appeal*, a petitioner may raise an ineffective assistance of counsel claim for the first time collaterally." *Osborn*, 861 F.2d at 623 (emphasis added).

Applying the factors identified in *Osborn*, which condition the hearing of defaulted ineffective assistance claims, we find that appellant's claim cannot meet those conditions. Appellant argues that he was unable to bring the ineffectiveness claim until after this court ruled on his direct appeal because it was not until after that ruling that he knew whether his trial counsel had actually been ineffective. We are unpersuaded by this argument. The appellant here had all the information available to him necessary to frame a claim for ineffective assistance of counsel. He had the record from the post-trial hearings on the matter, which

[3] We note that appellant was convicted in federal court for violation of a federal law. A federal rather than a state procedural rule was broken here. Nevertheless, "the federal interest in finality is as great as the State's, and the relevant federal constitutional strictures apply with equal force to both jurisdictions." *Frady*, 456 U.S. at 169 n.17 (1982).

included testimony both by the public defender who had alerted appellant's trial counsel to the problem and by trial counsel himself. Given this record, we believe that appellant could have brought the ineffective assistance claim on direct appeal and should have done so.

In addition we note that counsel on direct appeal was not the same attorney who represented appellant at trial. We are therefore not presented with the dilemma identified by the Seventh Circuit in *Bush v. United States*, 765 F.2d 683 (7th Cir.), *cert. denied*, 474 U.S. 1012 (1985), in which the court held that representation on direct appeal by the same allegedly ineffective trial counsel did not provide the petitioner with a fair opportunity to raise the ineffective assistance claim in a timely manner. *Id.* at 684.

Because appellant here does not qualify for the exception noted in *Osborn* which would allow an ineffective assistance claim to be raised for the first time collaterally, appellant must show cause and prejudice for his failure to argue ineffective assistance of counsel on direct appeal. Appellant has pointed to no cause and has identified no prejudice flowing from this failure. He is, therefore, barred from raising the claim in this collateral proceeding.

The judgment of the United States District Court for the District of New Mexico is hereby AFFIRMED.

ENTERED FOR THE COURT
PRE CURIAM

No. 89-2152, *United States v. Diaz-Albertini*

McKAY, Circuit Judge, concurring in the result:

I concur in the result in this case because I do not believe that, as framed, the appellant has stated a claim of ineffective assistance of counsel sufficient to meet the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). I do not, however, believe that the appellant has waived his right to raise the ineffective assistance of counsel claim in this collateral proceeding.

ORDER - July 18, 1990

Before McKAY, BARRETT, Circuit Judges, and KANE,* District Judge.

No. 89-2152

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
OSCAR DIAZ-ALBERTINI,
Defendant-Appellant.

This matter is before the court on appellant's petition for rehearing.

The materials submitted by appellant have been reviewed by the members of the hearing panel, the majority of whom conclude that the original disposition was correct. Accordingly, the petition is denied on the merits. Judge McKay would grant the petition because he believes the case to be controlled by *Chappell v. United States* ____ U.S. ____, 110 S. Ct. 1800 (1990).

Entered for the Court

ROBERT L. HOECKER, Clerk

*Honorable John L. Kane, Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

Criminal Case No. 84-43
Civil No. 89-0403 HB
Filed July 3, 1989

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
v.
OSCAR DIAZ-ALBERTINI,
Defendant-Movant.

ORDER

THIS MATTER having come before the Court on the proposed findings and recommended disposition of the United States Magistrate, and objections to the proposed findings and recommended disposition having been filed, and the Court having made a **de novo** determination of those portions of the Magistrate's proposed findings and recommended disposition objected to;

IT IS HEREBY ORDERED that the proposed findings and recommended disposition of the United States Magistrate are adopted by the Court,

IT IS FURTHER ORDERED that the Motion be, and it hereby is, denied.

HOWARD C. BRATTON
United States District Judge

Criminal Case No. 84-43-01
Civil No. 89-0403 HB
Filed May 24, 1989

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
v.
OSCAR DIAZ-ALBERTINI,
Defendant-Movant.

MAGISTRATE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

Proposed Findings

1. This is a proceeding on a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. §2255. Movant attacks the judgment and sentence entered in *United States v. Diaz-Albertini*, No. CR 84-43-01 (D.N.M.), *aff'd.*, 772 F.2d 654 (l0th Cir. 1985), *cert. denied*, _ U.S. _, 108 S.Ct. 82 (1987).

2. Movant asserts a single ground for relief: denial of his Sixth Amendment right to effective assistance of counsel. Movant's claim is based on trial counsel's failure to timely raise a claim of juror bias. The facts underlying Movant's juror bias claim are set forth in detail in the Court

of Appeals' decision affirming Movant's conviction. 772 F.2d at 655-57.

3. Where a claim is not presented in a procedurally correct manner at trial, a §2255 movant must demonstrate both cause and actual prejudice in order to obtain collateral relief. *United States v. Frady*, 456 U.S. 152, 167 (1982); *United States v. Shelton*, 848 F.2d 1485, 1490 (10th Cir. 1988). Thus, although Movant presents his ineffective assistance of counsel claim as an independent claim [1], Movant's claim is more properly analyzed as bearing upon the issue of whether there exists "cause" sufficient to excuse Movant's failure to present his juror bias claim in a procedurally correct manner.

4. Both the trial court and the Court of Appeals concluded that Movant's trial counsel deliberately and knowingly withheld Movant's claim of juror bias. This type of conduct by defense counsel cannot satisfy the cause prong of the cause and prejudice test. See *Reed v. Ross*, 468 U.S. 1, 14 (1984).

5. Additionally, this Court notes that Movant's ineffective-assistance-of-counsel claim is itself subject to the cause and prejudice test. On direct appeal, Movant's appellate counsel did not raise the claim that Movant's trial counsel was ineffective in his handling of the juror bias issue,

[1]This Court agrees with Respondent that Movant's ineffective assistance of counsel claim is a transparent attempt to relitigate Movant's underlying juror bias claim, which was rejected on procedural grounds by the Court of Appeals on direct appeal.

although the factual basis of Movant's current ineffective assistance of counsel claim clearly was available to appellate counsel. Thus, Movant's case presents what the Seventh Circuit Court of Appeals has termed a "'double procedural default' situation." *Carter v. Nix*. 803 F.2d 296, 299 (7th Cir. 1986). Movant's first default occurred when trial counsel withheld the juror bias issue. Movant's second default occurred when appellate counsel failed to raise on direct appeal the issue of trial counsel's ineffectiveness in handling the juror bias issue. Either default, if not excused by cause and prejudice,.is sufficient to preclude §2255 relief.

6. Movant's lead counsel in this §2255 proceeding is the same attorney who represented Movant on direct appeal. His withholding on direct appeal of Movant's ineffectiveness of trial counsel claim suggests to this Court exactly the same "tactical decision to forego a procedural opportunity," 468 U.S. at 14, that the Supreme Court denounced in *Reed*. As in the case of trial counsel, see discussion *supra* ¶4, this apparently deliberate withholding of a claim cannot qualify as cause for Movant's procedural default. *Reed*, 468 U.S. at 14. See also *Smith v. Murray*, 477 U.S. 527, 534 (1986).

7. In view of Movant's procedural defaults at trial and on appeal, and Movant's failure to demonstrate cause, his claim is subject to dismissal with prejudice.

Recommended Disposition

That the motion be denied.

Sumner G. Buell
UNITED STATES MAGISTRATE